Adi Radlan bin Abdul Rahman v Chai Kim Ngeok (Malaysian Bar Council, intervener)

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO WA-17D-26–05 OF 2016
HANIPAH FARIKULLAH J
23 AUGUST 2017

Legal Profession — Disciplinary board — Appeal against decision of disciplinary board — Appeal against finding of liability and order — Whether disciplinary board properly made order on liability of appellant — Legal Profession Act 1976 s 94(3)(m) & (n)

This was an appeal against the decision of the disciplinary board against the finding of liability and order for the appellant to make restitution of the sum of RM100,000 and fine of RM15,000. The appellant acted for the respondent in the High Court and Court of Appeal to recover the respondent's land from the bank. The respondent later made a complaint against the appellant for allegedly dishonestly manipulating compensation without the respondent's knowledge. The hearing took place before the disciplinary committee where the appellant was ordered to make restitution to the respondent. The fundamental issue of this appeal was whether the disciplinary board had properly made an order on the liability of the appellant. The intervener argued that the legal fees charged by the appellant towards the respondent were grossly excessive in all the circumstances and did not comply with s 94(3)(m) and (n) of the Legal Profession Act 1976 ('the Act').

Held, allowing the appeal:

(1) It could not be said that the appellant grossly overcharged the respondent. Based on the facts, the fees collected by the appellant were reasonable. The disciplinary committee had failed to consider that the litigation involved in the proceedings were extensive. The issue of grossly overcharging the client and/or disregarding the clients interest would not have arose if the disciplinary committee had taken the above facts into consideration (see paras 18 & 21–22).

(2) The judge accepted the applicant's submission that the disciplinary committee failed to consider that there was an agreement for the appellant to tax the party to party costs in the High Court and an omission by the appellant to inform the respondent of the same could not constituted to be a blatant disregard of the respondent's interest. It was untenable for the respondent to state that she had no knowledge of an agreement as the agreement was made on her behalf by her late husband.

There was no basis in the finding of the disciplinary committee. They had failed to appreciate that the respondent did not have sufficient evidence to warrant commencement of assessment of damages despite the appellants' attempts to procure the same (see paras 24, 27 & 29).

(3) The appellant had performed his duty as an advocate and solicitor in a professional manner. There was no evidence to show that the appellant had committed misconduct pursuant to s 94(3)(m) and (n) of the Act (see paras 34–35).

[Bahasa Malaysia summary

Ini adalah rayuan terhadap keputusan lembaga tatatertib berhubung dapatan liabiliti dan perintah untuk perayu membuat pengembalian jumlah RM100,000 dan denda RM15,000. Perayu bertindak bagi pihak responden di Mahkamah Tinggi dan Mahkamah Rayuan untuk mendapat balik tanah responden daripada bank. Responden kemudian telah membuat aduan terhadap perayu kerana dikatakan secara tidak jujur memanipulasikan pampasan tanpa pengetahuan responden. Perbicaraan diadakan di hadapan jawatankuasa tatatertib di mana perayu diperintahkan untuk memuat pengembalian kepada responden. Isu asas rayuan ini adalah sama ada lembaga tatatertib telah sewajarnya membuat perintah atas liabiliti perayu. Pencelah berhujah bahawa yuran guaman yang dikenakan oleh perayu terhadap responden adalah melampau dalam semua keadaan dan tidak mematuhi s 94(3)(m) dan (n) Akta Profesyen Undang-Undang 1976 ('Akta tersebut').

Diputuskan, membenarkan rayuan:

(1) Ia tidak boleh dikatakan bahawa perayu telah terlebih mengenakan caj ke atas responden. Berdasarkan fakta, yuran dikutip oleh perayu adalah munasabah. Jawatankuasa tatatertib telah gagal mengambil kira bahawa litigasi yang terlibat dalam prosiding itu adalah menyeluruh. Isu terlebih mengenakan caj anak guam dan/atau tidak menghiraukan kepentingan anak guam tidak mungkin timbul jika jawatankuasa tatatertib telah mengambil kira fakta di atas (lihat perenggan 18 & 21–22).

(2) Hakim menerima hujah pemohon bahawa jawatankuasa tatatertib telah gagal untuk mengambil kira bahwa terdapat perjanjian untuk perayu mengenakan cukai pihak kepada pihak kos di Mahkamah Tinggi dan peninggalan oleh perayu untuk memberitahu responden yang sama tidak merupakan secara terang-terangan mengabaikan kepentingan responden. Ia tidak dapat dipertahankan untuk responden menyatakan bahawa dia tidak mempunyai pengetahuan tentang suatu perjanjian kerana perjanjian itu telah dibuat bagi pihaknya oleh mendiang suaminya. Tiada asas dalam dapatan jawatankuasa tatatertib. Mereka telah gagal memahami bahawa responden tidak mempunyai keterangan mencukupi untuk mewajarkan permulaan taksiran ganti rugi meskipun

percubaan perayu-perayu untuk mendapatkan yang sama (lihat perenggan 24, 27 & 29).

(3) Perayu telah melaksanakan kewajipannya sebagai peguambela dan peguamcara secara profesional. Tiada keterangan untuk menunjukkan bahawa perayu telah melakukan salah laku menurut s 94(3)(m) dan (n) Akta tersebut (lihat perenggan 34–35).]

Notes

For cases on appeal against decision of disciplinary board, see 9 *Mallal's Digest* (5th Ed, 2015) paras 1512–1513.

Cases referred to

Globaltech Enterprise Sdn Bhd v Commerce Assurance Bhd [2014] 1 CLJ 517, HC (refd)

SP Veloo & Co v Affin Bank Bhd [2017] MLJU 1042; [2017] 1 LNS 1041, CA (refd)

Legislation referred to

Legal Profession Act 1976 ss 94(3)(m), (n), 116(1), 126

Chetan Jethwani (Alicia Goh Ai Chen with him) (Kumar Partnership) for the appellant.

Nurliny Che Soh (M Afiq Audy with her) (Nurliny & Azlinda) for the intervener.

Hanipah Farikullah J:

INTRODUCTION

[1] The appellant appealed against the decision of the disciplinary board dated 9 June 2016 against the finding of liability and in ordering the appellant to make a restitution of the sum of RM100,000 and fine of RM15,000.

THE COMPLAINT

[2] On 8 June 2013, the respondent made a complaint against the appellant:

> In the High Court final judgment, Land Title goes to me and Bank Pertanian Malaysia Berhad need to pay compensation in amount to me.
>
> After two years of high court rulings, I did not obtain any compensation including compensation for court fees and legal fees.
>
> I suspect my solicitor Adi Radlan is dishonesty in manipulate the compensation without my knowledge.

[3] This was supplemented by the respondent's letter dated 13 January 2014

where the respondent noted that she need the following:

(a) an explanation as to why the assessment of damages that was ordered by the court had not begun;

(b) an explanation as to what is taxed costs and why she was not informed of the proceedings; and

(c) disclosure of all compensation amounts in the high court judgment and related payment amount.

DECISION OF THE DISCIPLINARY COMMITTEE BOARD

[4] The hearing before the disciplinary committee took place and concluded on 8 August 2015. The disciplinary committee through its report dated 16 November 2015 recommended that the respondent ought to be imposed a fine of RM15,000 with a reprimand.

[5] On 23 May 2016, the disciplinary board considered the report of the disciplinary committee and affirmed the finding of liability by the disciplinary committee and further ordered that the appellant to make restitution to the complainant the sum of RM100,000.

THE INTERVENER'S SUBMISSION

[6] The intervener submitted that throughout the proceedings in the Johore Bharu High Court against the bank Pertanian Malaysia, the appellant had charged to the respondent a total of RM256,387.60. While the respondent had paid RM45,000 only, the balance left for the legal fees is amount to RM211,387.

[7] The intervener argued that according to s 94(3)(m) of the LPA 1976 that misconduct amongst the advocates and solicitors can be included as 'the charging, in the absence of a written agreement, in respect of professional services rendered to a client, of fees or costs which are grossly excessive in all the circumstances'.

[8] Based on the above provisions, the intervener argued that the legal fees charged by the appellant towards the respondent are grossly excessive in all of the circumstances. The amount charged is unreasonable.

[9] It was submitted for the intervener that the amount of RM256,387.60 is excessively high and exorbitant on the following grounds:

(a) this is not complex case. The sole issue before the High Court was whether the defendant had released the sum of RM240,00 to the plaintiff

and the plaintiff had received the said sum from the defendant. The issue before the court is a question of fact which is to be decided by the High Court by assessing the factual circumstances during the trial through the oral and documentary evidences;

(b) the case before the Johor Bharu High Court also does not involve special skill or knowledge. Whilst the documents filed may be thick and voluminous, this is no indication at all that the case is a complex one. The facts which led to the court's decision can be assess through witnesses that have been called by both parties. Such facts are ordinary facts and do not require any specialised knowledge;

(c) no specialise knowledge is required as the core issue before the court is whether the defendant had released the sum of RM240,000 to the plaintiff and the plaintiff had received the said sum from the defendant. A reference was made on the case of *Globaltech Enterprise Sdn Bhd v Commerce Assurance Bhd* [2014] 1 CLJ 517 (refer to intervener's bundle of authorities, Tab Be) where the court held that:

> [10] In assessing the costs payable, the court shall have regard to all relevant circumstances, in particular to (a) the complexity of the item or the cause or matter and the difficulty or novelty of the question involved;
>
> (b) the skill, specialized knowledge and responsibility required of and the time and labor expended by the solicitor and counsel; (c) the number and importance of the documents prepared and/or perused; (d) the place and circumstances in which the business involved in transacted; (e) the importance of the cause or matter to the client; (f) the value of the claim; and (g) any other fees and allowances payable: see O 59 r 16(1) ...
>
> [13] I refer to the grounds of judgment of the presiding judge. He stated that he was reluctant to certify costs for two counsels although the case might not be the run of the mill case. He said that the issues in the case were not that complex and did not require experts or specialists to give opinions on the issues in the trial. He said that there was no difficulty or novelty of the question involved in the case and could be easily decided on the question of facts.

(d) the documents involved during the trial were main pleadings and there was no complex documents to be analysed or studied. Besides that, the documents involved for the interlocutory application were the main documents for such applications (refer to the appellant's affidavit in support (3), exh AR9). Hence, the special skill and knowledge is not needed to pursue the documents filed by the parties.

ISSUE

[10] The fundamental question in this appeal is whether the DB had properly made an order on the liability of the applicant.

Section 94(3)(m) — Grossly charging the client in absence of a written agreement

[11] Relying on ss 126 and 116(1) of the Legal Profession Act 1976 ('the LPA'), learned counsel for the intervener argued that the appellant has failed to show any written agreement entered between the appellant and respondent during the course of the proceeding in the High Court.

[12] Learned counsel for the intervener agreed that the appellant only relied on the letter dated 9 July 2007 by the respondent to justify that there is an agreement made between both parties. However, according to the intervener, the letter itself does not amount to any agreement on the matter of payment should be made by the respondent.

[13] Section 94(3)(m) and (n) of the LPA 1976 are as follows:

> For the purposed of this Part, 'misconduct' means conduct or omission to act in Malaysia or elsewhere by an advocate and solicitor in a professional capacity or otherwise which amount to grave impropriety and includes:
>
> (m) the charging, in the absence of written agreement, in respect of professional services rendered to a client, of fees or costs which are grossly excessive in all the circumstances;
>
> (n) gross disregard of his client's interest.

[14] The approach that I should take upon an appeal of this matter is by referring to the Court of Appeal in *SP Veloo & Co v Affin Bank Bhd* [2017] MLJU 1042; [2017] 1 LNS 1041. In *SP Veloo*'s case, it was also the contention of the respondent that the sum claimed by the solicitor for work done was not reasonable.

[15] The Court of Appeal in the case of *SP Veloo* held as follows:

> [3] We wish to make it clear that: (i) LPA 1976 allows a solicitor to present to a client a bill for contentious matter; (ii) if the client is not happy with the bill, he has two options: (a) he can request the bill to be taxed and that has to be done within a year subject to conditions; (b) if the bill was not taxed and if he finds the sum as exorbitant, unreasonable or excessive, etc. the client can challenge the bill when the solicitors bring an action for recovery. The LPA 1976 does not prohibit the court from revisiting an exorbitant or unreasonable bill at the time of recovery proceedings. Only in exceptional circumstance that such a challenge may be successful; (iii) if the bill was not taxed within a year, it may be possible to seek extension of time to tax the bill pursuant to Additional Powers in Courts of Judicature Act 1964 ('the CJA 1964'). This possibility was discussed at length in relation to a different Act by Justice Nantha Balan in the recent case of *Perbadanan Pengurusan Anjung Hijau v Pesuruhjaya Bangunan* [2017] MLJU 679. As the parties had not raised the issue of extension and additional powers of the CJA 1964,

we will not deliberate on the matter though there may not be any prohibition for making such application if prima facie they can demonstrate the bill was not consented or exorbitant in a case where there was no prior agreement to the said sum and there was legitimate expectation from the client that the solicitor will only present a bill for a reasonable sum as per the market practice.

[16] I have not found the decision as to precisely what course to take an easy one in the present case. I have had regard specifically to the above passages and the facts of this present case, the fairest thing that I should do is to allow the appeal and I particularly have in mind in reaching that conclusion the fact that the appellant has performed extensive work from 1999–2011 and had undertaken substantial work which has resulted in judgment in favor of the respondent.

[17] The facts shows the following:

(a) the appellant billed and collected a sum of RM45,000 for work done between the year 2000 and 2004 at the High Court level;

(b) a substantial amount of additional work was done by the appellant between 2004 and 2009 at the High Court level which included but not limited to pre-trial preparation, interviewing witnesses, preparation of witness statements, inspection of documents, conduct of trial and submissions (detailed work will be canvassed below). The value of work conducted in the High Court has been assessed and valued by the high registrar in taxation;

(c) in 2007, the respondent acknowledged that there were professional charges due to the respondent and offered to pay him 30% of whatever damages are recovered from the bank. However the appellant's position is that he rejected this proposal;

(d) in December 2009 the work undertaken by the appellant at the High Court concluded with the respondent securing judgment in favor of the complainant;

(e) in February 2010, the appellant billed the complainant a sum of RM82,914 for the work that was to be undertaken at the Court of Appeal for which the complainant makes a partial payment of RM15,000 towards the work to be done at the Court of Appeal;

(f) in around August of 2010, the respondent pays the balance sum of RM67,914 for the work to be undertaken at the Court of Appeal out of the sums of RM84,927.54 recovered from the bank and the appellant returned a sum of RM17,013.54 being the differential amount to the respondent;

(g) in around December 2010, the appellant then taxed and recovered a sum of RM108,000 for work done at the High Court; and

(h) the appellant then undertook the appellate work at the Court of Appeal in 2011 and succeeded in having the bank's appeal dismissed but did not succeed on the respondent's appeal the issue of securing aggravated damages.

[18] It is noted that the DC placed much emphasis on the absence of a written agreement and failure to proceed with assessment of damages. As a result, the DC found the appellant has committed misconduct. The DC failed to take into account that the litigation involved in the proceedings was extensive.

[19] It is clear that the litigation included but was not limited to the following:

(a) an application for an interlocutory injunction to restrain the foreclosure proceedings against the land;

(b) an application to amend the statement of claim;

(c) an application by the bank to strike out the claim;

(d) preliminary objections taken by the bank on the respondent's affidavits;

(e) preliminary objections taken by the appellant against the affidavits filed by the bank;

(f) an application for discovery;

(g) the issuance of subpoenas against two witnesses for the complainant;

(h) the preparation of written and oral submissions;

(i) extensive research;

(j) pre-trial preparations for a claim for fraud, negligent misrepresentation and breach of contract;

(k) the preparation of witness statements through a translator and in Chinese script;

(l) the preparation of a police report on behalf of the respondent;

(m) the inspection of documents at the premises of the bank;

(n) the review of additional documents provided by the bank;

(o) the issuance of subpoenas for the witnesses who would be required at the trial;

(p) the conduct of the trial for a period of 12 days before the late Justice Genghadaran;

(q) the conduct of the trial for a period of two days before Justice Zawawi Salleh;

(r) submissions over a further two day period before Justice Zawawi Salleh;

(s) the examination of a total of seven witnesses;

(t) an appeal to the court of appeal by the bank;

(u) a cross-appeal to the court of appeal by the respondent;

(v) steps taken to enforce compliance of the terms of the judgment obtained by the complainant; and

(w) extensive correspondence with the opposing party.

[20] The broad timeline for the litigation was as follows:

(a) November 1999 — pre-litigation correspondence exchanged between the parties;

(b) June 2000 — litigation commenced against Bank Pertanian;

(c) 2001–2004 — interlocutory applications (including amendments and injunctive relief) and pre-trial case management compliance;

(d) 12 January 2005–14 March 2009 — trial of the action commenced and concluded with a total of 12 trial days. Trial part heard before the late Justice KP Genghadaran and continued before Justice Mohd Zawawi Salleh;

(e) 2 December 2009 — judgment delivered after trial and submissions;

(f) 1 April 2010 — complainant's cross-appeal to the Court of Appeal filed; and

(g) 25 April 2011 — both the complainant and the bank's respective appeals to the Court of Appeal heard and dismissed.

[21] It seems to me that if the DC had taken the above facts into consideration, the issue of grossly overcharging the client and/or disregarding the client's interest would not arise.

[22] Based on the above facts, it cannot be said that the appellant has grossly overcharged the respondent when in my view based on the facts, his collected fees are reasonable.

Section 94(3)(m) — Gross disregard of his client's interest

[23] The DB/DC held that the appellant has committed misconduct by grossly disregarding the respondent's interest.

[24] It is untenable for the respondent to state that she had no knowledge that there was such an agreement as the agreement was made on her behalf by her late husband whom she has always accompanied during meetings with the appellant.

[25] It is not disputed that the objective of the litigation was to recover the respondent's land from the bank which the appellant has successfully done so. The appellant has also successfully defended the appeal brought by the bank.

[26] The evidence shows that there are ample of documents to show that the appellant has sent numerous reporting letters updating the respondent the progress of her case. The respondent has also admitted that she is well aware of the progress of the case.

[27] The DC found that there were serious lapses occurred when the appellant went ahead with the tax party to party costs in the High Court. I accept the applicant's submission that the DC however failed to take into account that there was an agreement for the appellant to do so and omission by the appellant to inform the respondent of the same cannot be constituted to be blatantly disregarding the respondent's interest.

[28] The DC also seems to find that the appellant has committed misconduct pursuant to s 94(3)(m) of the LPA by failing to pursue assessment of damages on behalf of the respondent.

[29] In my view, there is no basis in the DC finding. The DB/DC failed to appreciate that the respondent did not have sufficient evidence to warrant commencement of assessment of damages despite the appellant's attempts to procure the same.

[30] The fact shows that the appellant has taken all reasonable steps to gather evidence of the respondent's loss when the bank failed to disburse the loan. The appellant has met with the respondent and daughter in law and discovered that the respondent did not have sufficient documentary evidence to establish losses she suffered as a result of the failure to disburse the loan to her account. In particular, the respondent has no supporting documents such as Borang J or any account to support the claim for damages.

[31] Nonetheless, the appellant took the effort to accompany the respondent to the Inland Revenue Department in order to determine her income during the period when the loan ought to have been disbursed. The appellant also identified a banker who was prepared to give evidence in her favor as to what her expected revenue would have been had the loan been disbursed.

[32] The appellant advised the respondent that the assessment proceedings would have involved at least three witnesses, two of whom would have to be subpoenaed. In the circumstances, the appellant indicated to the respondent that there would be charges payable on the assessment of damages.

[33] The respondent indicated that she did not intend to pay any further professional charges in respect of the matter. As a result, the assessment of damages was not pursued.

CONCLUSION

[34] In conclusion, it appears to me that the appellant has performed his duty as an advocate and solicitor in a professional manner.

[35] There is no evidence to show that the appellant has committed misconduct as pursuant to s 94(3)(m) and (n) of the LPA 1976.

[36] Accordingly, the appeal is allowed.

Appeal allowed.

Reported by Fatin Mohd Ismail